83 - 1491

No.

Supreme Court, U.S.
FILED
APR 9 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1983

LARRY SIKES, et al.,
Petitioners,

vs.

EDDIE BOONE, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JULIUS F. PARKER, JR.
(Counsel of Record)
MADIGAN, PARKER, GATLIN, SWEDMARK & SKELDING
P. O. Box 669
318 N. Monroe Street
Tallahassee, Florida 32302
(904) 222-3730
Attorneys for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

TABLE OF CONTENTS I
TABLE OF CITATIONS II
STATEMENT OF THE CASE 1

ARGUMENT—

PETITIONERS' POINT 1

The Decision Below Has Decided a Federal Question in a Manner Inconsistent With Applicable Decisions of This Court 1

PETITIONERS' POINT 2

The Decision Below Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court 13

CONCLUSION 14
CERTIFICATE OF SERVICE 15

TABLE OF CITATIONS

Federal Cases

Babbit v. United Farm Workers National Union, 442 U.S. 289, 60 L.Ed.2d 895, 99 S. Ct. 2301 (1979) 13-14

City of Chicago, et al. v. Confederation of Police, et al., 427 U.S. 902, 49 L.Ed.2d 1196, 90 S. Ct. 3186 (1976) 8

Confederation of Police v. City of Chicago, 382 F. Supp. 624 (N.D. Ill. 1974) 8

Confederation of Police v. City of Chicago, 529 F. 2d 89 (7th Cir. 1976) 8

Confederation of Police v. City of Chicago, 547 F. 2d 375 (7th Cir. 1977) 8, 9

Madison v. Gerstein, 440 F. 2d 338 (5th Cir. 1971) 4, 6

Sikes, et al. v. Boone, et al., 562 F.Supp. 74 (N.D. Fla. 1983) 12, 13

Tanner v. McCall, 441 F. Supp. 503 (N.D. Fla. 1977) 10

Florida Cases

Blackburn v. Brorein, 70 So. 2d 293 (Fla. 1954) 3, 4

Brevard County Police Benevolent Ascociation, Inc. v. Brevard County Sheriff's Dept., et al., 416 So. 2d 20 (Fla. 1st DCA 1982) 11, 12

Murphy v. Mack, 341 So. 2d 1008 (Fla. 1st DCA 1977) 6

Murphy v. Mack, 358 So. 2d 822 (Fla. 1978) 2, 3, 6, 7, 10

Szell v. Lamar, 414 So. 2d 276 (Fla. 5th DCA 1982) 3, 10, 11

Florida Statutes

Florida Constitution, Article I, Section 6 2

Chapter 447 6

Section 30.07 ..... 3, 4

Other Authorities

70 Am. Jur. 2d, Sheriffs, Police and Constables Section 2 7

No.

In the Supreme Court of the United States

October Term, 1983

LARRY SIKES, et al.
Petitioners,

vs.

EDDIE BOONE, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Respondents urge the Court, for the reasons set out hereinafter, to deny the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Respondents will accept Petitioners' Statement of the Case.

ARGUMENT

PETITIONERS' POINT I

The Decision Below Has Decided a Federal Question in a Manner Inconsistent With Applicable Decisions of This Court.

Petitioners in this case have claimed the right to bargain collectively pursuant to both the Constitution of the State of Florida and under the United States Consti-

tution. Their claim under the Florida Constitution is based on *Article I, Section 6* of the *Florida Constitution*, which provides as follows:

> "§6. Right to work
>
> The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of *employees*, by and through a labor organization, to bargain collectively shall not be denied or abridged. *Public employees* shall not have the right to strike." [Emphasis supplied]

The Supreme Court of Florida in the case of *Murphy v. Mack*, 358 So. 2d 822 (Fla. 1978), has foreclosed any question as to the rights of the Plaintiff class under the Florida Constitution. That case squarely held that Deputy Sheriffs under common law or constitutional sheriffs are not public employees. Since *Article I, Section 6* of the *Florida Constitution* grants the right to bargain collectively to "employees", and since the Florida Supreme Court has held that the Plaintiff Class are not employees, the Supreme Court's decision in *Murphy v. Mack*, supra, is conclusive as to any rights asserted by the Plaintiff Class under the Florida Constitution.

As to the claim of denial of equal protection under United States Constitution, the position of the Plaintiff Class is equally without merit. In Florida there are two different types of Sheriffs. The first type is the Sheriff of a Charter County or a Sheriff in a County which, by Special Act of the Legislature, has a civil service system applying to Deputy Sheriffs. In those Counties the Sheriff does not have absolute discretion in hiring and firing of Deputies, but he is likewise not burdened by a strict liability as to their actions. Rather, his liability

for his Deputies is governed by traditional doctrines of respondeat superior.

The second type of Sheriff is the traditional common law or constitutional Sheriff and all members of the Defendant Class are such common law or constitutional sheriffs. Their Deputies are appointed and have the same power as the Sheriff appointing them pursuant to *Florida Statutes, Section 30.07,* which provides as follows:

> "30.07 Deputy sheriffs
>
> Sheriffs may appoint deputies to act under them who shall have the same power as the sheriff appointing them, and for the neglect and default of whom in the execution of their office the sheriff shall be responsible."

Since *Section 30.07, Florida Statutes,* imposes virtually strict liability on common law or constitutional sheriffs for the actions of their deputies within the scope and course of their employment, the Florida Courts have consistently held that such a Deputy has no property right in his job and the Sheriff appointing him has absolute discretion as to hiring, firing, termination, promotion, discipline and deployment of such deputies. *Murphy v. Mack,* 358 So. 2d 822 (Fla. 1978); *Blackburn v. Brorein,* 70 So. 2d 293 (Fla. 1954); and *Szell v. Lamar,* 414 So. 2d 276 (Fla. 5th DCA 1982). The distinction between a deputy sheriff working in a charter county or under a civil service system on the one hand, and a deputy appointed by a constitutional sheriff on the other, is a distinction with a real difference, as the Courts of Florida and the District Court in the case at bar correctly held.

As the Supreme Court of Florida stated in *Blackburn v. Brorein,* 70 So. 2d 293 (Fla. 1954):

"There is a reason for the constitutional provisions and statutes with reference to sheriffs and deputy sheriffs. In our scheme of constitutional government we find throughout an attempt to place responsibility upon a particular officer or a particular class of officers. The supreme executive power of the State is vested in a chief executive styled the Governor. There can be only one Governor upon whom the people can place responsibility. He is clothed with the appointing power in many cases and he is responsible for his assistants. The judicial power is vested in the courts and that power cannot be shared with the executive or legislative power. It is essential to law enforcement in the various counties of the State that the people shall be able to place responsibility upon a particular individual, the sheriff. *He and he alone appoints his deputies and is responsible for them.* It was never contemplated that the sheriffs of the state must perform the powers and duties vested in them through deputies or assistants selected by someone else." 70 So. 2d at 298. [Emphasis supplied]

The distinction between a deputy or police officer under a civil service system or under a chartered county government on the one hand and an appointed deputy sheriff under a constitutional sheriff on the other, has likewise been recognized by the Federal Courts, and specifically by the United States Court of Appeals for the Fifth Circuit. In *Madison v. Gerstein*, 440 F. 2d 338 (5th Cir. 1971), the Court was confronted with an action against E. Wilson Purdy, Director of Public Safety and Sheriff of Dade County. Dade County was at that time and still is, what is referred to by Petitioners in their Complaint as a Charter County, in that in 1956 a consti-

tutional amendment was adopted which permitted Dade County to adopt the Home Rule Charter under which the Board of County Commissioners would be the governing body. That Charter, as adopted, abolished the constitutional office of Sheriff and transferred all the functions and duties of the Sheriff to a newly created public safety department headed by a Public Safety Director, also known as the Metropolitan Sheriff. The Defendant E. Wilson Purdy occupied that position and the Plaintiffs in the case attempted to argue that the Director of the Department of Public Safety should be liable for the acts of his Deputies and police officers within the scope and course of their authority pursuant to *Florida Statutes, Section 30.07*, which provided then as it provides now:

> "Sheriffs may appoint deputies to act under them who shall have the same power as the sheriff appointing them, and for the neglect and default of whom in the execution of their office the sheriff shall be responsible."

The United States District Court for the Southern District of Florida dismissed the case against the Defendant Purdy on the grounds that he was not liable for the acts of his deputy which he did not direct and of which he had no personal knowledge. The Fifth Circuit in affirming that dismissal made the following holding of law:

> "The basis for the distinction is said to be that, traditionally, sheriff's deputies act in the name of the sheriff in a representative capacity, whereas a police officer, like the police chief, is a public servant in his own right. Jordan v. Kelly, 223 F. Supp. 731, 738 (W.D.Mo. 1963). Underlying this rationale is

the difference in selection and tenure between the sheriff and the police chief, and the employment of their subordinates.

This is a matter controlled by Florida law. We have been cited no Florida cases or legislative authority which determine the point.

However, we believe that Purdy's argument is sound and that it is reasonable to assume that Florida would so hold, if confronted squarely with this issue. To assume otherwise would require the conclusion that Florida would burden this office with derivative liability even though it has excised the basic characteristics of the traditional sheriff's office which supported such liability.

We sustain the District Court's dismissal of this case against E. Wilson Purdy, the Public Safety Director and Sheriff on the ground that he is not liable for the acts of his deputy which he did not direct and of which he had no personal knowledge." 440 F. 2d at 342. [Emphasis supplied]

Murphy v. Mack, supra, arose when the Public Employees Relations Commission determined that deputy sheriffs under Sheriff Ernest P. Murphy of Osceola County and under Sheriff William Heidtman of Palm Beach County, were public employees within the meaning of *Chapter 447, Florida Statutes*. The Sheriffs appealed that decision to the District Court of Appeal for the First District which affirmed at 341 So. 2d 1008. The Florida Supreme Court granted certiorari on the basis that the decision affected a class of constitutional officers and reversed both the First District and the Public Employees Relations Commission. The Supreme Court of Florida in its decision quotes with approval the following descrip-

tion of the office of deputy from *70 Am. Jur. 2d, Sheriffs, Police and Constables, Section 2*:

> "The office of under or deputy sheriff is a common-law office; and this is the rule unless a change is effected by the constitution or statute law of the state. He holds an appointment, as distinguished from an employment. Where so clothed with power, a deputy sheriff is a public officer, although he may not be a state or municipal officer within the meaning of constitutional provisions. A deputy sheriff is a public officer under laws which require his appointment by the sheriff to be approved by a judge, and which provide that he must take an oath of office, and confer on him powers and duties equal to those of the sheriff himself. As such, he has been held not subject to civil service regulations. And in the absence of specific language including deputy sheriffs, a deputy sheriff has been held to be an official, and not an employee, of a county, within the meaning of a workmen's compensation act. A deputy sheriff has been held to be embraced within the words 'or other county officer' contained in a statute relating to jury service, and, a special deputy, or one employed in particular cases, has been held to be an officer of the state under a statutory provision relating thereto." 358 So. 2d at 825.

The Court concludes its opinion with this direct holding of law:

> "Accordingly, we hold that a sheriff is a 'public employer' within the definition of Chapter 447, Florida Statutes (1975), *but that a deputy sheriff is not a 'public employee' within the contemplation of said act.*" 358 So. 2d at 826. [Emphasis supplied]

The decision of the Seventh Circuit in *Confederation of Police v. City of Chicago*, 547 F. 2d 375 (7th Cir. 1977), is directly on point. In *Confederation of Police v. City of Chicago*, supra, the Plaintiff, which was a Union similar to the Florida Fraternal Order of Police and the Police Benevolent Association, brought suit against the City of Chicago seeking a decision requiring the City of Chicago to bargain collectively with the Confederation of Police as representing police officers of the City of Chicago. The United States District Court for the Northern District of Illinois dismissed the action, 382 F. Supp. 624, and the Plaintiffs appealed to the Seventh Circuit. The Seventh Circuit at 529 F. 2d 89 (1976) affirmed in part and reversed in part. The decision of the District Court was affirmed as to the equal protection argument and as stated at page 93 of the Opinion held:

> "In this action the District Court went on to hold that even if there was differential treatment of civil service employees, it was not violative of the equal protection clause because there exists a rational basis for the differential treatment, and the Legislature is not required to treat all groups alike. It is unnecessary for this Court to reach this issue." 529 F. 2d at 93.

The City of Chicago sought certiorari in the U. S. Supreme Court which vacated the decision of the Seventh Circuit and remanded for further consideration in light of several cited decisions at 49 L.Ed.2d 1196. On remand the Seventh Circuit affirmed the decision of the District Court on the question of due process on the basis that Chicago Police Officers had no property interest in their jobs under State law of Illinois. As the Seventh Circuit states on remand:

> "Our previous decision was bottomed on the premise that a Chicago patrol officer has a property

interest, protected by the due process clause, in the conditions of his employment. Because we found that a patrol officer had a state law entitlement to a particular situation or job, we held that he could not be transferred to a job imposing substantially greater burdens or with less pay without the provision of procedural due process. It is now clear that our underlying premise was erroneous. In Bishop v. Wood, the Supreme Court held that the existence of a property interest in public employment cognizable under the due process clause depends on whether state law has affirmatively created an expectation that a particular employment relationship will continue unless certain defined events occur. See 426 U.S. at 344, 96 S. Ct. at 2078. See also Paul v. Davis, 424 U. S. 693, 710-712, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) (a property interest attains constitutional status by virtue of initial recognition and protection by state law).

There is no Illinois law, whether from a statutory, regulatory, or judicial source, that protects a Chicago patrol officer from adverse action short of discharge or suspension by the Police Department. In its earlier opinion, this court cited Ill. Rev. Stat. Ch. 24, §10-1-18.1, as a source of protection for a patrol officer's particular job conditions. This statute, however, is limited by its own terms to discharges or suspensions.

Absent affirmative recognition in Illinois law of an entitlement to particular job conditions, plaintiff's due process claim must fail. Accordingly, the judgment of the district court is affirmed, with costs in the Supreme Court as well as costs of appeal allowed to appellee." 547 F. 2d at 376.

It is clear from the Florida Supreme Court's decision in *Murphy v. Mack*, supra, that Deputy Sheriffs appointed by constitutional Sheriffs in Florida have no property interest in their jobs. This was the square holding of the United States District Court for the Middle District of Florida in *Tanner v. McCall*, 441 F. Supp. 503 (N.D. Fla. 1977), in which:

> "The Court concludes that plaintiffs had no property interests under Florida law in their jobs as Lake County Sheriff's deputies. Therefore no Fourteenth Amendment due process guarantees are required." 441 F. Supp. at 509.

Petitioners in this case have no claim under due process because appointed Sheriff's deputies have no property interest in their jobs. They have no claim under equal protection of the laws because there is a valid and very real distinction between law enforcement officers such as police officers, highway patrol officers and the like who truly are employees, and deputy sheriffs appointed by constitutional Sheriffs, who are clearly officers whose powers derive solely from the Sheriff appointing them. A Deputy Sheriff is simply the alter ego of the Sheriff and the Sheriff is almost strictly liable for his deputy's actions within the scope and course of his employment. There being a valid and rational distinction between such deputies and other law enforcement officers and employees of the State of Florida, Plaintiffs have no claim of violation of equal protection of the laws.

The Florida Courts have consistently upheld the philosophy set forth by the Supreme Court in *Murphy v. Mack*, supra. In a case decided while the case at bar was pending before the District Court, *Szell v. Lamar*, 414 So. 2d 276 (Fla. 5th DCA 1982), the Court expressed it as follows:

"A sheriff is authorized to appoint deputies for whose acts he is responsible, to act in his stead. Section 30.07, Florida Statutes (1981). A deputy sheriff holds office by appointment, rather than by employment, and is thus an officer, rather than an employee. Murphy v. Mack, 358 So. 2d 822 (Fla. 1978). The Sheriff has absolute control over the selection and retention of deputies in order that law enforcement be centralized in the county and in order that the people be able to place responsibility upon a particular officer for failure to law enforcement. Section 30.53, Florida Statutes (1981); Tanner v. McCall, 625 F. 2d 1183 (5th Cir. 1980); Blackburn v. Brorein, 70 So. 2d 293 (Fla. 1954); Murphy, 358 So. 2d at 825. Thus, a deputy sheriff has no property interest in his office and no constitutional due process protections when he is dismissed." 414 So. 2d at 277, 278.

In another decision while the case at bar was pending before the District Court, and in which the Plaintiff was represented by counsel for the Petitioners herein, *Brevard County Police Benevolent Association, Inc. v. Brevard County Sheriff's Department, et al.*, 416 So. 2d 20 (Fla. 1st DCA 1982), the Court held as follows:

"The Association urges on appeal that the Commission's decision violates *the equal protection clause* of the United States Constitution and the basic rights and provisions of the Florida Constitution. The phrasing of the specific question on appeal reveals the flaw in the Association's position: 'Whether the deputy sheriffs of the Brevard County Sheriff's Department enjoy the constitutional right to bargain collectively guaranteed every person/employee of this State by Article I, Section 6 of the Constitution of Florida,' Article I, Section 6 speaks only of *em-*

ployees, not persons and does not, therefore, have applicability to persons who are not defined as *employees*. The Florida Supreme Court has already held that appointed deputy sheriffs are not 'employees' within the meaning of Chapter 447, rather they are 'officers.' Murphy v. Mack, 358 So. 2d 822 (Fla. 1978). This determination was not based simply on the statute, but was an interpretation of common law. In so ruling, the court stated that the deputies' status, having arisen out of common law, could be changed by explicit provision in state statutes or appropriate local government law." 416 So. 2d at 21. [Emphasis supplied]

The cases cited above were carefully considered by the District Court, which is clear from the conclusion of the Court's Memorandum Opinion dated January 14, 1983, 562 F. Supp. 74 (N.D. Fla. 1983) as follows:

"It is clear from a reading of *Murphy v. Mack, supra*, that the Florida Supreme Court did not arrive at this determination that deputy sheriffs are appointees in an arbitrary fashion. Rather, the court examined the unique historical status of deputy sheriffs and concluded that they were not employees within the meaning of section 447.203, *Florida Statutes*. Deputy sheriffs are treated no differently than other appointees, that is, they do not have the right to engage in collective bargaining. The plaintiffs contend that the Equal Protection Clause is violated because they are not treated the same as other law enforcement officers in the State of Florida. *The court finds, however, that other law enforcement officers in Florida are different in fact from these deputy sheriffs.* The Constitution does not require things which are different in fact . . . to be treated in law

as though they were the same.' *Tigner v. State of Texas*, 310 U.S. 141, 147, 60 S. Ct. 879, 882, 84 L. Ed. 1224 (1940). Because of the unique historical status of deputy sheriffs, this court finds that their exclusion from the coverage of the Chapter 447, Part II, *Florida Statutes*, is reasonable and is not invidiously discriminatory. Accordingly, the court finds that neither the defendants' conduct nor the Florida Supreme Court's interpretation of section 447.203(3), *Florida Statutes*, violates the Equal Protection Clause of the Fourteenth amendment of the United States Constitution." 562 F. Supp. at 81. [Emphasis supplied]

The decisions of the District Court for the Northern District of Florida and the Court of Appeals for the Eleventh Circuit are both in perfect accord with controlling Federal case law.

PETITIONERS' POINT 2

The Decision Below Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

Petitioners contend in this Court, as they have consistently throughout the history of this litigation, that there is a fundamental constitutional right to collective bargaining for all persons who work for a governmental entity. Petitioners have cited no authority whatsoever for that contention, perhaps because there is none.

The decisions below have not decided any questions which have not already been decided by this Court. This Court, in a case cited by the Trial Judge in his Memorandum Opinion, *Babbitt v. United Farm Workers Na-*

tional Union, 442 U.S. 289, 60 L.Ed.2d 895, 99 S. Ct. 2301 (1979), had occasion to rule on the question of whether there is a constitutional right to collective bargaining. This Court disposed of that question as follows:

> "Accepting that the Constitution guarantees workers the right individually or collectively to voice their views to their employers (citations omitted) the Constitution does not afford such employees the right to compel employers to engage in a dialogue or even to listen." 60 L.Ed.2d at 915, 916.

CONCLUSION

Petitioners herein seek to have this Court reverse a decision of the highest Court of the State of Florida on a question of Florida law. The decisions of both lower Courts are perfectly in accord with established Federal case law. Certiorari should be denied.

Respectfully submitted, this 6th day of April, 1984.

JULIUS F. PARKER, JR.
(Counsel of Record)
MADIGAN, PARKER, GATLIN, SWEDMARK & SKELDING
P. O. Box 669
318 N. Monroe Street
Tallahassee, Florida 32302
(904) 222-3730
Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to:

MR. THOMAS F. PANZA
Panza and O'Donnell
4520 N.E. 18th Avenue
Ft. Lauderdale, Florida 33334

MR. GENE "HAL" JOHNSON
General Counsel
Florida Police Benevolent Association, Inc.
223 West College Avenue
Tallahassee, Florida 32301

by mail, this 6th day of April, 1984.

JULIUS F. PARKER, JR.
(Counsel of Record)
MADIGAN, PARKER, GATLIN, SWEDMARK & SKELDING
P. O. Box 669
318 N. Monroe Street
Tallahassee, Florida 32302
(904) 222-3730
Attorneys for Respondents